**THE HIGH COURT OF SOUTH AFRICA**
**(NORTHERN CAPE DIVISION, KIMBERLEY)**

**Not Reportable**
Case no: 2250/2016

In the matter between:

**MEMBER OF THE EXECUTIVE COUNCIL**
**FOR HEALTH: NORTHERN CAPE PROVINCE** **APPLICANT**

and

**DAVIDENE CHANELLE ARENDS** **RESPONDENT**

Case no: 2250/2016

**And in re:**

**DAVIDENE CHANELLE ARENDS** **APPLICANT**

and

**MEMBER OF THE EXECUTIVE COUNCIL**
**FOR HEALTH: NORTHERN CAPE PROVINCE** **RESPONDENT**

**Neutral citation:** *Arends v Member of the Executive Council for Health, Northern Cape Province* (2250/2016) 30 January 2026)

**Heard:** 5 December 2025

**Delivered:** 30 January 2026

## ORDER

1. The application for leave to appeal by the Member of the Executive Council for Health: Northern Cape Province, under case No: 2250/2016, is dismissed with costs on party and party scale; such costs are to include the costs consequent upon the employment of two counsel on scale B, as set out in rule 67A read with rule 69 of the Uniform Rules of this Court.

2. The application for condonation of the late filing of the application for leave to appeal by Ms Davidene Chanelle Arends (Ms Arends), under case No: 2250/2016, is dismissed with costs, such costs are to include the costs consequent upon the employment of two counsel on scale B, as set out in rule 67A read with rule 69 of the Uniform Rules of this Court.

3. The application for leave to appeal by Ms Arends under case No: 2250/2016 is dismissed with costs on party and party scale; such costs are to include the costs consequent upon the employment of two counsel on scale B as set out in rule 67A read with rule 69 of the Uniform Rules of this Court.

4. The defendant is to pay the wasted costs in respect of the proceedings of 7 November 2025.

## JUDGMENT

**Phatshoane DJP**

**Introduction**

[1] Two applications for leave to appeal stand to be simultaneously adjudicated. They are directed at two judgments handed down under case no 2250/2016 on 11 August 2023 (the first judgment) and 31 May 2024 (the second judgment), respectively. The application for leave to appeal against the first judgment was filed by the Member of Executive Council for Health, Northern Cape (MEC), the defendant in the trial court. The first judgment concerned the date on which interest would accrue on a debt settled by agreement between the parties, in particular, the capital amount awarded to Ms Davidene Chanelle Arends, on behalf of the minor child (NM), the plaintiff in the trial court. The application for leave to appeal against the second judgment was submitted by Ms Arends. The second judgment concerned reconsidering two costs orders made on 15 March 2023 and 11 August 2023, respectively, under the *Calderbank* principle. For convenience, the parties are referred to by their citations in the action.

**The application for leave to appeal in respect of the first judgment**

[2] The plaintiff's action for damages against the defendant arising from the injuries suffered by NM during his birth was settled by agreement between the parties. In terms of the consent order dated 15 March 2023, the defendant was liable to pay the plaintiff on behalf of NM R20 million, inclusive of the trustees' remuneration and the costs of creating the trust, in full and final settlement of the claim. The amount would be paid in six instalments. The first instalment of R3.5 million was payable on 31 May 2023, and the remaining five equal instalments of R3.3 million at the end of each of the subsequent five months, with the final payment being on 31 October 2023.

[3] The only question that stood for determination was whether the defendant was liable to pay interest *a tempore morae* on the capital amount of R20 million from 15 March 2023, the date of the consent order, to 31 October 2023, the date of final payment or whether the interest was due and payable only in the event the defendant defaulted in the payment of the capital amount as ordered. I found that s 2A(3) of the Prescribed Rate of Interest Act 55 of 1975 (the PRIA) applied because the debt mainly consists of the present value of a future loss. I concluded that interest shall not commence to run until the date upon which the quantum is determined by judgment, arbitration, or agreement. That determination would, for the purposes of the PRIA, be deemed to be a judgment debt. Accordingly, I ordered that the defendant pay interest on the capital amount from 15 March 2023, the date the consent order was issued, to the date of final payment, at the rate of 10.75% per annum.

[4] The defendant assails the first judgment on three principal bases. First, it was contended that I failed to strike out paragraphs 40 to 42 of the plaintiff's answering affidavit as they contained hearsay evidence. Secondly, that I erred in failing to have regard to the fact that the defendant is an organ of State obliged to make a payment within 30 days of the date of the order becoming final in terms of s 3(3)(*a*)(*i*) of the State Liability Act 20 of 1957 and thirdly, that I erred in failing to find that the plaintiff was not entitled to any interest unless the defendant is in default of payment.

[5] The reasons for the decision not to strike out the specified paragraphs are set out in the judgment and need not be repeated. In the defendant's counsel's heads of argument, it is submitted: "It bears emphasis" that the court did not take the hearsay into account. Accordingly, there is no merit in the argument that I erred in having refused to strike out the specified paragraphs. There could never have been any prejudice.

[6] The defendant accepted that the State Liability Act does not regulate interest on debts due by the State. The manner in which interest was claimed in the summons was superseded by the agreement on the quantum. However, the parties did not agree on the

date on which the interest would commence, necessitating a separate adjudication of that issue. Section 2A(3) of the PRIA expressly provides that interest commences to run from the date of any agreement.

[7] The grounds of appeal are unsustainable on the facts and the law. Accordingly, there is no reasonable prospect of a successful appeal. It is trite that even where the court is unpersuaded of the prospects of success, it must still enquire whether there is a compelling reason to entertain the appeal. A compelling reason includes an important question of law or a discrete issue of public importance that will have an impact on future disputes. However, the merits remain crucial and often decisive.[1]

[8] There is no compelling reason why the appeal should be heard on the payment of interest. The application does not raise an important question of law or a matter of public importance that will affect future disputes and merit the attention of the Full Court or the Supreme Court of Appeal (SCA). The corollary of this is that the application must be dismissed.

[9] It was argued for the plaintiff that an award of costs on party and party scale should follow the result, including the costs for the employment of two counsel on scale C. The assessment of the appropriate scale involves the exercise of the court's discretion, with due consideration of the factors set out in rule 67A(3)(*b*), which are by no means exhaustive. The issues raised in the application for leave are not complex. They traverse issues already dealt with in the first judgment. Therefore, I am of the view that costs on scale B would be appropriate.

**The application for leave to appeal in respect of the second judgment**

[10] In the second judgment, the plaintiff sought relief pursuant to a secret offer to settle that she made on 25 January 2023, that the party and party costs as contained in the consent order of 15 March 2023 be up to and include 25 January 2023 and that an award

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[1] *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) para 2.

of costs on an attorney and client scale be made with effect from 26 January 2023 onwards. Therefore, the key issue for adjudication in the second judgment was whether the plaintiff was entitled to seek reconsideration of the costs where her claim was settled by agreement, which included an order of costs.

[11] Relying on the principles enunciated in *Erasmus v Santam Insurance Ltd and Another*[2] I concluded that acceptance of an offer encompassing both the claim and costs terminated all pre-existing entitlements and effectively ended the litigation. As alluded to in the judgment, it was impermissible for the plaintiff to invoke a *Calderbank* offer to seek a special costs order after the grant of a consent order inclusive of costs. I had further found that genuine attempts to amicably resolve the dispute had been ongoing for quite some time, characterised by various offers and counteroffers. I was unpersuaded that the defendant had displayed unreasonable conduct throughout the negotiation phase in its independent estimate of the case's value or its assessment of the risk of costs should the litigation proceed to finality. Consequently, the application for reconsideration was dismissed with costs.

[12] The plaintiff's application for leave was filed on 14 November 2024, approximately six months following the delivery of the judgment, whereas the application for condonation was filed a month thereafter, on 20 December 2024. Both applications are opposed. The delay of four and a half months, calculated from the period within which the application ought to have been delivered, is inordinate. The explanation for the delay is wholly unpersuasive. In short, the plaintiff's attorney, who deposed to the founding affidavit in the application for condonation, intimated there had been some discussion by the plaintiff's legal team regarding whether to file the application for leave, given the risks involved in pursuing an appeal. After September 2024, the legal team reconsidered its initial position against filing the application. He states:

[2] 1992 (1) SA 893 (W) at 895H-896.

'Our reconsideration and critical re-assessment of our initial advice caused us to realise that the presiding judge indeed did not only exercise a discretion but actually came to an incorrect conclusion on certain facts and the application of certain legal principles.'

The explanation of the delay does not cover the entire duration, set out the sequence of events bearing upon the delay, or specify the dates and times of the said in-depth deliberations regarding whether to proceed with the applications.

[13] To determine whether condonation ought to be granted, an assessment of the plaintiff's prospects of success would be required. This entails a consideration of the plaintiff's grounds of appeal, to which I now turn. In the broad framework, it was contended for her that I incorrectly summarised the facts pertaining to the settlement agreement insofar as I concluded that the parties agreed on the payment of costs on party and party scale. It was submitted that I erred in failing to consider that the true context of the settlement agreement was the settlement of the quantum against the background of a draft order prepared by both parties with two distinct aspects. First, it includes an agreement on the quantum of the damages payable, the payment terms, an acceleration clause, and the consequences of non-payment. The first part of the consent order, it was argued, was not subject to the court's discretion to intervene. The second part, so it was contended, was the remainder of the draft order, always subject to and intended by the parties to be subject to the Court's discretion, part of which was still to be adjudicated, namely, the question of interest.

[14] It was further argued on behalf of the plaintiff that I erred in failing to consider the plaintiff's waiver of rights. The onus to prove the waiver to pursue reconsideration of costs following the consent order rested on the defendant, and the defendant had failed to discharge it. Much was also made that, in another judgment I authored, *Du Toit N.O obo Nkuna v Road Accident Fund (Nkuna),*[3] I had found 'a difference of a mere R20 000 to be sufficient for a reconsideration of the costs in that case'. It was further argued that this played a prominent role in the legal advice provided to the plaintiff regarding the risk of

[3] [2024] ZANCHC 78; [2024] 4 All SA 476 (NCK).

an appeal and the decision to advise against it. *Nkuna,* it was submitted, impelled the plaintiff to seek condonation and to file the present application for leave.

[15] In opposition, the defendant raised no less than five points *in limine*, which are mostly a repeat of what they argued in the main application. These were dealt with in the judgment.

[16] There is no merit in any of the grounds raised. All the terms of the consent order of 15 March 2023 are preceded by the caption in this capital letters: 'IT IS ORDERED BY AGREEMENT THAT: . . .'. Clauses 7 and 9 of the said order, by agreement, deal with the question of costs. In particular, at Clause 7, it was expressly agreed that:

> 'The Defendant shall make payment of the First Plaintiff's reasonable taxed or agreed party and party costs on the High Court scale, which costs shall include, but not limited to, the following:
> 7.1 The costs consequent upon the employment of two counsel, inclusive of counsel's full reasonable day fees for 13 to 17 and 20 to 22 February 2023 and 13, 14 and 15 March 2023;'

At Clause 9 of the order by consent, the following terms were plainly agreed to on the issue of party and party costs:

> 'The following provisions shall apply with regard to the determination of the aforementioned taxed or agreed costs:
> 9.1 The First Plaintiff shall serve the notice of taxation on the Defendant's attorney of record;
> 9.2 The First Plaintiff shall allow the Defendant 30 (thirty) calendar days to make payment of the taxed costs from the date of the settlement or taxation thereof.'

[17] It is patently incorrect that I misunderstood that the parties did not agree on the payment of costs on party and party scale. Obviously, they did. The question of the plaintiff's waiver to avail herself of the reconsideration was not decisive. As stated in the judgment, the nub of this case lay in the last agreement concluded between the parties on 14 March 2023, which led to the consent order of 15 March 2023 and the weight to be attached to that.

[18] The law on settlement agreements is well-established. A compromise (*transactio)*, whether extra-judicial or embodied in an order of the Court, has the effect of *res judicata*.[4] The consent order brings finality to the *lis* between the parties; the *lis* becomes *res judicata,* 'a matter judged'. It changes the terms of a settlement agreement to an enforceable court order.[5]

[19] *Nkuna* is manifestly distinguishable. It is not authority for the proposition that a party can call in aid the *Calderbank* principles when parties had settled the dispute by means of an agreement. In any event, in *Nkuna*, the trial ran its full course, and the judgment was handed down in favour of the plaintiff following the evaluation of the evidence. In this case, the trial did not run to its completion but was settled on the capital sum, costs, and other matters incidental thereto, save on the question of interest. This effectively terminated the *lis*. The plaintiff failed in her bid to invoke the *Calderbank* offer not primarily because of the purported marginal difference between what the defendant tendered in response to her second secret offer. More fatal to her quest to seek reconsideration of costs was that she had agreed with the defendant to settle the costs on party and party scale as contained in the consent order. Giving effect to an agreement freely made is appropriate. Nothing prevented the plaintiff, if she wished to rely on that principle, from requesting the Court to reserve the question of costs for later adjudication when granting the agreed order, as she did with the payment of interest on the capital sum awarded. Instead, she took a consent order that settled all the issues.

[20] As to the reconsideration of costs in respect of the first judgment (which concerned the interest), it bears repeating that the argument on reconsideration of costs in respect of that judgment attracted a similar reasoning as in the main application for reconsideration and had to suffer the same fate. If the question of interest was self-standing as the plaintiff sought to suggest, then it makes no sense that she would invoke

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[4] *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and Others* 1978 (1) SA 914 (A) at 922C.

[5] *Eke v Parsons* 2016 (3) SA 37 (CC) para 31.

the *Calderbank* principle on the first judgment's cost order as opposed to seeking leave to appeal against those costs.

[21] The plaintiff is required to show that the defendant acted unreasonably in not accepting the plaintiff's *Calderbank* offer.[6] No unreasonable conduct on the part of the defendant was shown.

[22] The applicability of the *Calderbank* principle was not disputed in *Itokolle-Clinix Private Hospital (Pty) Ltd v MNT obo DORM*[7]. There, SCA confirmed the High Court's decision on appeal, in which the principle had been invoked. The *Calderbank* offer and its purpose of curbing unnecessary litigation are recognised principles not only in the High Courts but also in the SCA. Nothing on this aspect requires the attention of the Full Court or the SCA, nor is there anything in the judgment that disturbs the application of the *Calderbank* principle. The law on the effect of a settlement agreement is also not res nova. It is firmly entrenched.[8]

[23] A court of appeal will not lightly interfere with a costs order, let alone one which was conceived through an agreement between the parties, as in this case. The mere fact that a court of appeal might have made an order that is different from the high court's costs order is not a basis to interfere with the exercise of that high court's discretion.[9]

[24] The plaintiff did not show 'sufficient cause' warranting the Court's exercise of discretion in condoning the late filing of the application for leave to appeal. The upshot of this is that there are no reasonable prospects of success on appeal. Stated otherwise, I am not swayed that another Court may come to a different conclusion. Where the prospects of success on appeal are non-existent, there would be no point in granting

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[6] *Itokolle-Clinix Private Hospital (Pty) Ltd v MNT obo DORM* (863/2024) [2025] ZASCA 153 (16 October 2025) para 49.
[7] *Ibid* para 50.
[8] *Eke v Parsons* 2016 (3) SA 37 (CC).
[9] *Itokolle-Clinix Private Hospital (Pty) Ltd v MNT obo DORM (supra)* para 55.

condonation.[10] Therefore, the application for condonation and the application for leave to appeal itself must fail.

[25] The defendant sought costs on a party and party scale, including costs for the employment of two counsel on scale C. One more, I am of the view that the issues raised in the application were not intricate. They were a repeat of what was canvassed in the main application for reconsideration of costs and dealt with in the second Judgment. Accordingly, scale B would be appropriate.

**The costs of 07 November 2025**

[26] The residual issue concerns the wasted costs for the proceedings of 07 November 2025. The plaintiff argued that the defendant should bear those costs, whereas the defendant argued that each party should pay its own costs. It is so that the defendant did not, from the outset, oppose the plaintiff's application for condonation but did so on 06 November 2025, the eve of the hearing, in his heads of argument. In truth, neither party was prepared to argue the applications on 7 November 2025. However, the plaintiff could not proceed primarily because the defendant made certain allegations in his heads of argument, which prompted the plaintiff to request a postponement to file an affidavit in response. In the end, the defendant did not persist with the allegations. As I see it, the defendant occasioned the postponement. Consequently, he must pay the wasted costs.

In the result, the following order is made:

**Order:**

1. The application for leave to appeal by the Member of the Executive Council for Health: Northern Cape Province, under case No: 2250/2016, is dismissed with costs on party and party scale; such costs are to include the costs consequent

[10] *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532D.

upon the employment of two counsel on scale B, as set out in rule 67A read with rule 69 of the Uniform Rules of this Court.

2. The application for condonation of the late filing of the application for leave to appeal by Ms Davidene Chanelle Arends (Ms Arends), under case No: 2250/2016, is dismissed with costs, such costs are to include the costs consequent upon the employment of two counsel on scale B, as set out in rule 67A read with rule 69 of the Uniform Rules of this Court.

3. The application for leave to appeal by Ms Arends under case No: 2250/2016 is dismissed with costs on party and party scale; such costs are to include the costs consequent upon the employment of two counsel on scale B as set out in rule 67A read with rule 69 of the Uniform Rules of this Court.

4. The defendant is to pay the wasted costs in respect of the proceedings of 7 November 2025.

[redacted]

M V PHATSHOANE
DEPUTY JUDGE PRESIDENT

**Appearances**

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| For the plaintiff: | Adv WP De Waal SC (with Adv CH Botha) |
| Instructed by: | Elliot Maris Attorneys, Kimberley. |
| For the defendant: | Adv RT Williams SC (with Adv S Mahomed) |
| Instructed by: | Robert Charles Attorneys, Kimberley. |